KEMAJUAN FLORA SDN BHD

v.

PUBLIC BANK BHD & ANOR

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL SUIT NO: 22-81-2001]
27 OCTOBER 2005

CIVIL PROCEDURE: *Judgments and orders - Setting aside, application for - Whether delay of 170 days in applying to set aside order constituted inordinate delay*

CIVIL PROCEDURE: *Costs - Personal liability of solicitor - Applicable principles - Commencing futile litigation - Whether solicitor may be personally liable for costs although not a party - Whether solicitors have immunity from personal liability for costs*

LEGAL PROFESSION: *Liability as officer of court - Costs - Personal liability of solicitors - Conduct which may attract personal liability for costs*

LEGAL PROFESSION: *Duty of care - Immunity - Scope of immunity in Rondel v. Worsley - Whether immunity applies in relation to solicitor's personal liability for costs*

The plaintiff's solicitors had filed various proceedings for the plaintiff against the second defendant in the High Court in relation to the same cause of action. In all these proceedings the second defendant had succeeded in obtaining various orders with costs against the plaintiff. The second defendant then applied for security for costs against the plaintiff in the sum of RM100,000 to be borne and paid forthwith by the plaintiff's solicitors personally. At the hearing of this application, the plaintiff and its solicitors were not present. No affidavit was filed by the plaintiff in reply to the second defendant's affidavit in support of the application. The registrar then made an order for security for costs in terms of the application, directing the plaintiff's solicitors to personally pay the costs to the second defendant on an indemnity basis. The plaintiff's solicitors later applied under, *inter alia*, O. 59 r. 8 of the Rules of the High Court 1980 ('RHC') to set aside the order for security for costs. Another Registrar dismissed the plaintiff's solicitor's application. The plaintiff's solicitors appealed against the second Registrar's decision. The following issues were raised at the appeal: (a) that there was an inordinate delay on the part of the plaintiff's solicitors in making the application to set

aside the order for security for costs; (b) that the plaintiff's solicitors were non-parties to the litigation and therefore the security for costs order should not have been made against them; (c) that the plaintiff's solicitors enjoyed immunity from the security for costs order; (d) that the plaintiff's solicitors were not served with a notice to show cause and hence had no opportunity to explain why the security for costs order should not be made against them personally; (e) that the plaintiff's solicitors had not incurred useless or wasted costs; and (f) that there had been no "gross misconduct" on the part of the plaintiff's solicitors.

Held (dismissing the appeal with cost):

[1] There had been an actual delay of some 170 days (*ie*, 200 days minus the 30 days prescribed under O. 42 r. 13 RHC) on the part of the plaintiff's solicitors in filing the application. Whether this delay was inordinate or otherwise could be determined by reference to the judicial trend established in similar circumstances. In the present case, the delay of 170 days constituted inordinate delay. (pp 968 f & 969 e)

[2] The procedural law regulating the personal liability of solicitors for costs is to be found in O. 59 r. 8(1) RHC. The relevant principles are: (a) the jurisdiction of the court in ordering solicitors to pay personally the costs is one that the court by virtue of its inherent powers exercises over solicitors in their capacity as officers of the court and is exercised not to punish the solicitor but to protect and compensate the opposite party; (b) under O. 59 r. 8(1)(c) RHC, solicitors may be personally liable for the costs of the action by reason of its vexatiousness; (c) an advocate and solicitor is an officer of the court and his professional conduct is always under the supervision and scrutiny of the court, and that when there is dereliction of duty on the part of the advocate and solicitor in the conduct of his professional work, the court may, in a proper case, order him to be personally liable for the costs of the proceedings after giving him an opportunity to defend himself; (d) the jurisdiction to order an unsuccessful party's solicitors to pay personally the costs of the opposing successful party must be exercised with great care and only where there is clear evidence that the solicitors had allowed to proceed an action which was so inappropriate that it could only be an abuse of the process of the court. (pp 971 b, h & 972 a-e)

[3] It is trite law that although an advocate and solicitor is not a party to the litigation in question, his conduct of the litigation may be such as to attract the application of O. 59 r. 8(1)(a) and (b) or (c) RHC, in which case the court may be left with no other alternative but to exercise the discretion thereunder and make an order holding the solicitor personally liable for costs. (p 973 a)

[4] The House of Lords in *Rondel v. Worsley* had accorded barristers in England immunity from being sued by their disgruntled clients for whom they appear in court, on the ground of public policy. However, that immunity should not be any wider than is strictly necessary in the interests of the administration of justice. This immunity has no relevance to the consideration of the solicitor's personal liability for costs which in our country is regulated under O. 59 r. 8 RHC. (p 973 d-f)

[5] The requirements under O. 59 r. 8(2) RHC are self-explanatory, and consist of a reasonable opportunity to appear before the court and to show cause why the order should not be made. The factual background in this case had fulfilled the requirements under O. 59 r. 8(2) RHC which is a statutory expression of the common law rules of natural justice. The plaintiff's solicitors were aware of the hearing of the application for security for costs but had chosen not to be present nor filed any affidavit in reply. They had elected to waive the reasonable opportunity to appear before the court for the purpose of showing cause why the order should not be made. (p 974 c-d)

[6] On the present facts, there was an indefatigable initiative and endless effort on the part of the plaintiff's solicitors who were so insistent in bringing litigation with no regard to any merit whatsoever, thereby resulting in the consistent and persistent dismissals with the plaintiff being mulcted in costs. Such costs could well have been nibbed in the bud had the plaintiff's solicitors refrained from engaging in the above futile litigation. There was no doubt that costs had been incurred improperly or without reasonable cause or wasted within the ambit of O. 59 r. 8(1) RHC. The conduct of the plaintiff's solicitors came within the provisions of O. 59 r. 8(1) and (2) RHC for which an order could be made thereunder. (pp 975 f-g & 976 b)

Case(s) referred to:

Abraham v. Jutsun [1963] 2 All ER 402 ***(refd)***
Carl-Zeiss-Stiftung v. Herbert Smith & Co & Anor (No 2) [1968] 2 All ER 1233 ***(refd)***
In the Matter of: Graham Ross Bendeich [1994] 126 ALR 643 ***(refd)***
Karpal Singh v. Atip Ali [1987] 1 MLJ 291 ***(refd)***
Khor Cheng Way v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 CA ***(refd)***

Koperasi Belia Nasional Bhd v. Storage Enterprise (Port Kelang) Sdn Bhd [1998] 3 CLJ 335 CA ***(refd)***
Mitra & Co v. Thevar & Anor [1960] MLJ 79 ***(refd)***
Mohd Nor Dagang Sdn Bhd v. Tetuan Yusof Endut [2001] 2 CLJ 364 HC ***(refd)***
Mohd Yusof Awang & Anor v. Malayan Banking Bhd & Anor [1995] 4 MLJ 493 ***(refd)***
Myers v. Elman [1940] AC 282 ***(refd)***
Ng Han Seng & Ors v. Scotch Leasing Sdn Bhd [2003] 4 CLJ 533 CA ***(refd)***
Orchard v. South Eastern Electricity Board [1987] 1 All ER 95 ***(refd)***
Rees v. Sinclair [1974] 1 NZLR 180 ***(refd)***
Ridehalgh v. Horsefield & Anor [1994] Ch 205 ***(refd)***
Rondel v. Worsley [1961] 1 AC 191 ***(refd)***
SZABF v. Minister for Immigration (No 2) [2003] FMCA 178 ***(refd)***
Tan Thian Wah v. Tan Tian Tiok & Ors [1998] 2 CLJ Supp 300 HC ***(refd)***
Thomas v. Attorney-General of Sarawak [1961] MLJ 111 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 38(1)
Rules of the High Court 1980, O. 32 rr. 5, 6, O. 42 r. 13, O. 59 r. 8(1)(a), (2), O. 92 r. 4
Rules of the Supreme Court 1957, O. 65 r. 11

Other source(s) referred to:
Charlesworth & Percy on Negligence, 9th edn, pp 567, 568

For the plaintiff - Zulhasmi Zakaria; M/s Idris & Partners
For the 2nd defendant - Thara Singh Sidhu; M/s Thara Singh Sidhu

Reported by Amutha Suppayah

JUDGMENT

Low Hop Bing J:

Appeal

Vide amended summons in chambers in encl. (146), plaintiff's solicitors Messrs Idris & Partners sought to set aside an order of the learned registrar ("registrar 1") who had on 13 June 2003 directed the plaintiff's solicitors to personally pay the costs to the second defendant on an indemnity basis.

Another learned registrar ("registrar 2") had on 27 October 2004 dismissed encl. (146).

Enclosure (158) is the appeal by the plaintiff's solicitors against registrar 2's decision.

Factual Background

Plaintiff's solicitors had filed various proceedings for the plaintiff against the second defendant in this court in relation to the same cause of action as follows:

1. Originating summons No. 24-90-1998;

2. Originating summons No. 24-259-2001; and

3. Civil suit MT1-22-81-2001 which is the instant suit.

The second defendant has also obtained various orders against the plaintiff, tabulated below:

Court	Proceedings	Date	Order
1. Melaka High Court	SP 24-90-1998	5 January 2001	Second defendant granted leave to intervene, with costs against the plaintiff
2. Melaka High Court	SP 24-90-1998	7 March 2001	Plaintiff's application for stay of execution was dismissed with costs
3. Melaka High Court	SP 24-259-2001	2 November 2001	Order in terms against the plaintiff
3.1 Court of Appeal	M-02-93-2001 against decision in SP24-259-2001	9 June 2003	Plaintiff's appeal dismissed with costs
4. Melaka High Court	GS 22-81-2001	13 June 2003	Security for costs ordered against the plaintiff to be paid personally by the plaintiff's solicitors on an indemnity basis

5.	Melaka High Court	GS 22-98-2002	10 September 2001	Plaintiff's writ and statement of claim against defendant dismissed with costs
6.	Melaka High Court	SP24-90-1998	20 June 2002	Allocatur against plaintiff for RM8,892.78
7.	Melaka High Court	SP24-90-1998	12 September 2002	Allocatur against the plaintiff for RM23,059.68
8.	Melaka High Court	SP24-259-2001	19 February 2003	Allocatur against the plaintiff for RM112,849.50

On 16 April 2003, the second defendant *vide* application by way of summons in chambers in encl. (117) sought an order for security for costs against the plaintiff in the sum of RM100,000 to be borne and paid forthwith by the plaintiff's solicitors personally.

On 13 June 2003 ie, the hearing date for encl. (117), the plaintiff and its solicitors were not present. No affidavit was filed by the plaintiff in reply to the second defendant's affidavit in support of encl. (117). Registrar 1 made an order for security for costs in terms of encl. (117) ("the security for costs order').

Vide encl. (146) filed on 3 August 2004, the plaintiff applied under, *inter alia,* O. 59 r. 8 of the Rules of the High Court 1980 to set aside the security for costs order on, *inter alia,* the following grounds:

1. Plaintiff's solicitors had no *locus standi* to represent the plaintiff as both the plaintiff's directors *viz* Wong Tiang and Madam Lock Kim Lian had been adjudged bankrupt on 2 April 2003 and 9 May 2003 respectively;

2. The new directors appointed on 3 June 2003 had not passed a resolution to retain the plaintiff's solicitors to represent the plaintiff;

3. The absence of the plaintiff's solicitors on 13 June 2003 was not intentional as they have written to the court applying for postponement of the hearing of encl (117) on 13 June 2003; and

4. The security for costs order was irregular.

On 26 October 2004, encl. (146) was heard before registrar 2 who, after hearing submissions, dismissed it on 27 October 2004.

Delay

It was contended by the second defendant's learned counsel Mr. Thara Singh Sidhu that the plaintiff's solicitors had taken 345 days to make the application when O. 42 r. 13 prescribes a period of 30 days after receipt of the order or judgment by the plaintiff's solicitors.

Mr. Zulhasmi bin Zakaria, learned counsel for the plaintiff's solicitors stressed that the delay, if any, is not inordinate delay, as the security for costs order was served on 3 October 2003 and the application was filed on 26 April 2004, in which case, there was a delay of six months and three weeks only ie, about 200 days.

I shall first refer to O. 42 r. 13 which reads:

> **13 Setting aside or varying judgments and orders (O. 42 r. 13)**
>
> Where in these Rules provisions are made for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment must make his application to the Court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.

There can be no doubt that there has been an actual delay of some 170 days (ie, 200 days minus the 30 days prescribed under O. 42 r. 13) on the part of the plaintiff's solicitors in filing the application. Whether this delay is inordinate or otherwise may be determined by reference to the judicial trend established in similar circumstances.

The Court of Appeal through the judgment of Gopal Sri Ram JCA in *Khor Cheng Way v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396 held, *inter alia*, that where a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously and that the burden is on the litigant who has delayed to render a satisfactory explanation for it.

Order 42 r. 13 was considered by the Court of Appeal in *Ng Han Seng & Ors v. Scotch Leasing Sdn Bhd* [2003] 4 CLJ 533 CA where there was an unexplained delay of two months by the first and third appellants, and seven months by the second appellant in filing their respective application to set aside the judgment in default. Nik Halshim JCA (now FCJ) speaking for the Court of Appeal at p. 536 b-d held that the merits of the defendants' application could not be considered and the application itself should be dismissed in limine.

In *Koperasi Belia Nasional Bhd v. Storage Enterprise (Port Kelang) Sdn Bhd* [1998] 3 CLJ 335 CA, the sealed copy of the ex parte judgment was served on the defendant on 3 February 1994 but the defendant's application to set aside the judgment was made more than 30 days, in contravention of O. 42 r. 13. The Court of Appeal in three separate judgments delivered respectively by NH Chan JCA (as he then was), Abu Mansor Ali, JCA (later FCJ), and Abdul Malek Ahmad JCA (later PCA) unanimously affirmed my decision in dismissing the defendant's application on the ground that it was filed out of time.

In *Lee Cheng Yin, supra,* there was a delay of five years and 11 months by the defendant in filing the application to set aside a default judgment, as a result of which I held that the delay was inordinate and detrimental to the defendant's application.

In the instant appeal, I am of the view that the aforesaid delay of 170 days constitutes inordinate delay. However, for purposes of completeness, I shall proceed to hear and determine this appeal on its merits.

Non-parties

For the plaintiff's solicitors, it was submitted that they are non-parties to the litigation herein, and so the security for costs order should not be made against them, relying on *Mohd Yusof bin Awang & Anor v. Malayan Banking Bhd & Anor* [1995] 4 MLJ 493 HC, *Carl-Zeiss-Stiftung v. Herbert Smith & Co. (a firm) And Another (No. 2)* [1968] 2 All ER 1233 HC; *Orchard v. South Eastern Electricity Board* [1987] 1 All ER 95 CA; and *In The Matter Of: Graham Ross Bendeich* [1994] 126 ALR 643 Federal Court of Australia.

For the second defendant, it was contended that the above argument is ill-conceived, as O.59 r8 may be invoked although the plaintiff's solicitors are non-parties, citing:

1. *Mitra & Co v. Thevar & Anor* [1960] MLJ 79;

2. *Tan Thian Wah v. Tan Tian Tiok & Ors* [1998] 2 CLJ Supp 300; and

3. *Karpal Singh v. Atip bin Ali* [1987] 1 MLJ 291

In my judgment, the answer to the above submissions may be ascertained by a careful consideration of the authorities cited for the parties.

First, in *Mohd Yusof bin Awang, supra,* the first plaintiff was a bankrupt when the proceedings against the defendants were instituted. The second defendant applied for an order that the first plaintiff's advocate be personally liable for costs on the ground that the first plaintiff was an undischarged bankrupt at the time of the commencement of the action and no sanction had been obtained from the official assignee's office as required by s. 38(1) of the Bankruptcy Act 1967. The learned registrar refused the application. On appeal, Arifin Zakaria J (now FCJ) held, inter alia, that the advocate should be personally liable for all the costs thrown away.

Next, in *Graham Ross Bendeich, supra,* Drummond J held, *inter alia*, in para 9 of the judgment, that in Australia, the Court of Bankruptcy has the power to order a person not a party to the proceedings to pay the costs of one or both of those parties.

In my view, the above two authorities cited for the plaintiff's solicitors are actually against the contention presented for them.

Next, in *Carl-Zeiss-Stiftung, supra,* the plaintiff, a corporate entity carrying on business in East Germany, brought an action against another organisation of the same name carrying on business in West Germany claiming, *inter alia*, that the property and assets of the West Germany company belonged to the plaintiff. The plaintiff brought a separate action against the defendants, the two firms of solicitors acting for the West Germany company in the main action, claiming that they viz the two firms of solicitors should be accountable for, *inter alia*, costs. Pennycuick J held that the plaintiff's separate action against the two firms of solicitors was contrary to public policy and should not be entertained by the court.

In *Orchard, supra,* the plaintiff instructed solicitors and obtained legal aid to bring an action against the defendant claiming damages for, *inter alia,* negligence. The defendants alleged that the damage was self-inflicted. Prior to the trial, defendants' solicitors wrote to plaintiff's solicitors stating that the action was misconceived, and if unsuccessful, the defendants' solicitors intended to apply for an order making the plaintiff's solicitors personally liable for costs. After trial, the learned judge dismissed the plaintiff's claim. The

defendants then applied for an order that the plaintiff's solicitors personally pay for their costs, which the learned trial judge and subsequently on appeal, the Court of Appeal, refused.

The facts in the above two authorities are clearly distinguishable from the facts in the instant appeal and so they can render no assistance to the plaintiff's solicitors.

The procedural law regulating the personal liability of solicitor for costs is to be found in O. 59 r. 8(1) which is reproduced as follows:

> **8 Personal liability of solicitor for costs (O. 59 r. 8)**
>
> (1) Subject to the following provisions of this rule, where in any proceedings costs are incurred improperly or without reasonable cause or are wasted by undue delay or by any other misconduct or default the Court may make against any solicitor whom it considers to be responsible (whether personally or through a servant or agent) an order:
>
> (a) disallowing the costs as between the solicitor and his client; and
>
> (b) directing the solicitor to repay to his client costs which the client has been ordered to pay to other parties to the proceedings; or
>
> (c) directing the solicitor personally to indemnify such other parties against costs payable by them.

The precursor of O. 59 r. 8 was O. 65 r. 11 of the then Rules of Supreme Court 1957, which has been considered by the Court of Appeal in *Mitra & Co, supra*. Hepworth J in the High Court had formed a certain view as to the conduct of the appellant as solicitor for the plaintiff ("the solicitor") and without any application being made to him by counsel for the defendant, called upon the solicitor there and then to show cause under O. 65 r. 11 why costs incurred by the plaintiff should not be disallowed as between solicitor and client, and also why he should not repay to his client the costs awarded to the defendant in the action. The learned judge made an order against the solicitor. However, the solicitor's appeal against that order was allowed by the Court of Appeal through the judgment of Thomson CJ.

Be that as it may, it is to be observed that Thomson CJ did set out important principles in relation to this specific area.

In addition, a few other authorities have also established useful principles.

In my judgment, I propose to collate the relevant principles as follows:

1. The jurisdiction of the court in ordering solicitors to pay personally the costs is one that the court by virtue of its inherent powers exercises over solicitors in their capacity as officers of the court and is exercised not to punish the solicitor but to protect and compensate the opposite party: *Myers v. Elman* [1940] AC 282 HL as applied by Thomson CJ in *Mitra & Co, supra;*

2. Under O. 59 r. 8(1)(c), solicitors may be personally liable for the costs of the action by reason of its vexatiousness: *Tan Tian Wah v. Tan Tian Tiok & Ors, supra,* per Suriyadi J;

3. An advocate and solicitor is an officer of the court and his professional conduct is always under the supervision and scrutiny of the court, and that when there is dereliction of duty on the part of the advocate and solicitor in the conduct of his professional work the court may, in a proper case, order him to be personally liable for the costs of the proceedings after giving him an opportunity to defend himself: per Seah SCJ in *Karpal Singh v. Atip bin Ali, supra;*

4. The jurisdiction to order an unsuccessful party's solicitors to pay personally the costs of the opposing successful party must be exercised with great care and only where there was clear evidence that the solicitors had allowed to proceed an action which was so inappropriate that it could only be an abuse of the process of court: *Orchard, supra.*

5. In relation to useless or wasted costs, the English Court of Appeal stated in *Ridehalgh v. Horsefield And Anor* [1994] Ch. 205 that:

   5.1. Orders should only be made where and to the extent that the conduct so characterised had been established as directly causative of wasted costs;

   5.2 The advocate's immunity in court to court proceedings was to be read subject to the provision of the Act so that an advocate whose conduct in court had been improper, unreasonable or negligent would be liable to a wasted costs order; and

   5.3. Having regard to the cab-rank principle imposed on barristers and public policy considerations, representation afforded to the unpopular and unmeritorious pursuit of a hopeless case could not of itself be characterised as "improper, unreasonable or negligent.

Later in this judgment, I shall revert to the contention presented for the plaintiff's solicitors in relation to useless or wasted costs.

From an analysis of the above authorities, I am of the view that it is trite law that although an advocate and solicitor is not a party to the litigation in question, his conduct of the litigation may be such as to attract the application of O. 59 r. 8(1)(a) and (b) or (c), in which case the court may be left with no other alternative but to exercise the discretion thereunder and make an order holding the solicitor personally liable for costs.

Barristers' Immunity

It was argued that the plaintiff's solicitors enjoy immunity from the security for costs order, citing *Rondel v. Worsley* [1961] 1 AC 191 HL; and *Mohd Nor Dagang Sdn Bhd v. Tetuan Yusof Endut* [2001] 2 CLJ 364 HC.

A contrary view was taken for the second defendant as the matter here concerns solicitors and not barristers, adding that there is no blanket immunity, citing *Charlesworth & Percy on Negligence* 9th edn., pp. 567 and 568.

My consideration of *Rondel, supra,* leads me to conclude that the House of Lords had accorded barristers in England the immunity from being sued by his disgruntled client for whom he appears in court, on ground of public policy. (See also *Mohd Nor Dagang Sdn Bhd, supra,* per Abdull Hamid Embong J). However, that immunity should not be any wider than strictly necessary in the interest of the administration of justice: per Mc Carthy P in *Rees v. Sinclair* [1974] 1 NZLR 180, as cited in *Charlesworth & Percy,* pp 567 and 568, *supra.*

In my view, the immunity enunciated in the above authorities has no relevance to the consideration of the solicitor's personal liability for costs which in our country is regulated under O. 59 r. 8, read together with the judicial pronouncements in *Mitra, supra; Tan Thian Wah, supra;* and *Karpal Singh, supra,* which have consistently concluded that personal liability for costs may be incurred by a solicitor under O. 59 r. 8.

Notice To Show Cause

It was contended for the plaintiff's solicitors that they have not been served with the notice to show cause and hence had no opportunity to explain why the security for costs order should not be made against them personally. Reference was made to:

1. *Orchard, supra;*
2. *Karpal Singh, supra;*
3. *Thomas v. Attorney-General of Sarawak* [1961] MLJ 111;
4. *Mohd Yusof bin Awang, supra;* and
5. *Abraham v. Jutsun* [1963] 2 All ER 402 CA.

The response for the second defendant is that the requirement under O. 59 r. 8(2) has been fulfilled but the plaintiff's solicitors had chosen not to attend.

In my judgment, it needs to be observed that the contention of the plaintiff's solicitors runs counter to the factual background as unfolded in the narrative above.

O. 59 r. 8(2) where relevant provides as follows:

> (2) No order under this rule shall be made against a solicitor unless he has been given a reasonable opportunity to appear before the court and show cause why the order should not be made, …

It is obvious to me that the requirements under O. 59 r. 8(2) are self-explanatory, and consist of a reasonable opportunity to appear before the court and to show cause why the order should not be made. In my view, the above factual background has fulfilled the requirements under O. 59 r. 8(2) which is a statutory expression of the common law rules of natural justice. The true position is that the summons in chambers in encl. (117) had been served on the plaintiff's solicitors who were aware of the hearing on 13 June 2003, but had chosen not to be present nor file any affidavit in reply. They have elected to waive the reasonable opportunity to appear before the court for the purposes of showing cause why the order should not be made.

Useless Or Wasted Costs

It was argued for the plaintiff's solicitors that they have not incurred useless or wasted costs, relying on, *inter alia*, *SZABF v. Minister for Immigration (No. 2)* [2003] FMCA 178; and *Ridehalgh v. Horsefield And Another*, *supra*.

The second defendant's response is that the plaintiff's solicitors had filed suits after suits on behalf of the plaintiff and all of them had failed.

I would first consider the Australian case of *SZABF, supra,* which is the decision of a magistrate who had originally ordered an absent solicitor to pay the costs personally in the sum of A$4500 without hearing him. The solicitor was subsequently heard. The solicitor's evidence showed that he had not occasioned useless costs and the original order was vacated.

On my part, I find that the facts there are substantially different from those before me as the plaintiff through its solicitors have been embroiled in a long string of litigations which have consistently collapsed. Hence, I am of the view that the Australian case is of no assistance to the plaintiff's solicitors herein.

In *Ridehalgh, supra,* at the conclusion of four actions, applications were made seeking orders that the opposing parties' solicitors pay personally costs wasted in the litigation. These applications were resisted on the grounds that the solicitors' conduct had neither been "improper, unreasonable or negligent" nor had it caused costs to be wasted. In each case, the judge made the order sought. However, the Court of Appeal allowed the appeal, holding that there was no conduct which could be construed as "improper, unreasonable or negligent" as understood in the following established meaning *viz*:

1. "improper" applied to conduct which amounted to any significant breach of a substantial duty imposed by a relevant code of professional conduct and included conduct so regarded by the consensus of professional opinion;

2. "unreasonable" described conduct which did not permit a reasonable explanation; and

3. "negligent" was to be understood in an untechnical way to denote a failure to act with the competence reasonably to be expected of ordinary members of the profession.

The facts in *Ridehalgh, supra,* revealed that the solicitor had been obliged to accept the brief and could not withdraw from the case at such short notice as that would prejudice the clients; and that the counsel's conduct could not be stigmatised as improper etc, nor wasteful of costs. In my view, the facts there are substantially distinguishable from the factual background unfolded above and so this authority is unsupportive of the contention for plaintiff's solicitors.

In my judgment, it is to be noted that the above factual background is clear and unambiguous, as it shows the indefatigable initiative and endless effort on the part of the plaintiff's solicitors who were so insistent in bringing litigations with no regard to any merit whatsoever, thereby resulting in the consistent and persistent dismissals with the plaintiff being mulcted in costs. Such costs could well have been nibbed in the bud had the plaintiff's solicitors refrained from engaging in the above futile litigations. There can be no doubt that costs have been incurred improperly or without reasonable cause or wasted within the ambit of O. 59 r. 8(1).

Misconduct

It was canvassed that there had been no "gross misconduct" on the part of the plaintiff's solicitors who should not suffer the costs personally, referring to *SZABF, supra; Thomas v. Attorney General, supra; Orchard, supra;* and *Mohd Nor Dagang, supra.*

In reply, it was said for the second defendant that registrar 2 has not erred in dismissing the application by the plaintiff's solicitors to set aside registrar 1's order.

Having regard to the factual background, I am of the view that the short answer lies in the conduct of the plaintiff's solicitors which comes within the provisions of O. 59 r. 8(1) and (2) for which an order may be made thereunder.

Conclusion

On the foregoing grounds, I am of the view that the decision of registrar 2 is correct which I hereby affirm. This appeal is devoid of merits. I therefore dismiss it with costs.